SUPREME COURT, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 800

SIDNEY L. IRWIN, et al.,
Petitioners,

vs.

BOB CLARK, doing business as Oilfield Vacuum Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 11, 1968.[1]

[1]Additional petitioners are Ray Lester Long, Sherrill Long, Alan Duane Luther, Melvin Long, Wayne King and Harry Edward Allen.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court, R. 79, printed in Appendix A hereto, infra, p. i, is unreported. The opinion of the Court of Appeals is printed in Appendix B hereto, infra, p. v.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1968, and there was no petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). Original jurisdiction was conferred on the United States District Court for the Eastern District of California (at the time of trial, the United States District Court, Southern District of California, Northern Division) by 28 U.S.C. Section 1337.

QUESTIONS PRESENTED

1. Can an employer evade the minimum wage law, to his own economic advantage, by inducing employees to stay on the premises "voluntarily" under an employment arrangement where job priority is given to those who are present when work orders come in?

2. Has the true intent of the minimum wage law been met where an employer pays no compensation to employees for time spent on the premises waiting for job orders to be phoned in and where priority, and hence larger pay checks, goes to those who are

present on the premises, rather than to those who stand by to be called at home?

3. Has the minimum wage law been interpreted "in the light of economic reality", as hitherto required by this Court, where the presence of employees on the premises is designated as "voluntary" even though they will get work priority by remaining on the premises?

4. In the bluntest terms, isn't this simply saying that such employees are free "voluntarily" to starve themselves and their families?

5. Is not such an employer doing nothing more than securing profit for himself by illegally coercing his employees to render wholly uncompensated service?

STATUTES INVOLVED

The statutory provisions involved are sections of the Fair Labor Standards Act and are at 29 U.S.C.A. 202-a, 29 U.S.C.A. 203, 29 U.S.C.A. 206, 29 U.S.C.A. 207, 29 U.S.C.A. 216-b, and 29 U.S.C.A. 260.

STATEMENT OF THE CASE

It may serve to avoid confusion to note that the transcript of record only incorporates the Reporter's Transcript by reference (p. 2 of Index). The Reporter's Transcript itself was prepared prior to judgment and is before the Court in two volumes as a

separate document. It thus has its own pagination rather than one which follows the rest of the transcript.

A pre-trial order, approved as to form and content by both counsel and signed by the trial Court on December 6, 1965, provided that the trial Court had jurisdiction by virtue of the provisions of 28 U.S.C. 1337 and that the following facts were admitted and required no proof:

1. The plaintiffs were employees of the defendant during the times and at the wages shown in the accounting heretofore rendered by the defendant.
2. At the times pertinent to the complaint defendant operated a business which engaged in the work of oil field servicing; at the same said time plaintiffs were truck drivers employed by the defendant.
3. That plaintiffs were paid for all hours actually worked at either the hourly wage rate or the overtime rate but were not paid for waiting time at the defendant's premises. (R. 16-17.)

The pre-trial order went on to state that "the following issues of fact and no others remained to be litigated upon the trial:

A. Was the work performed by the plaintiffs directly essential to the production of oil which moved in interstate commerce or was said work a process closely related to said pro-

duction of oil, so as to bring plaintiffs within the purview of the Fair Labor Standards Act?

B. Are plaintiffs entitled to compensation for waiting time upon defendant's premises under the Fair Labor Standards Act?

C. Is waiting time to be considered hours worked for purposes of computing minimum wages and overtime, as required by the Act?

D. Are plaintiffs barred from recovering for the waiting time spent at defendant's yard because such presence was a part of the oral or written contracts of employment between plaintiffs and defendant or because such waiting time is a part of the custom and practice in the industry?

E. What is the amount of minimum wages and overtime due to each plaintiff, if any?

F. Are plaintiffs entitled to double recovery as provided in 29 U.S.C.A. 216-b?

G. What, if any, should be the reasonable attorney's fee to be paid by the defendant, and what, if any, are the costs which should be paid by the defendant as provided in 29 U.S.C.A. 216-b? (R. 17-18.)

There was no controversy as to the accuracy of the records kept by respondent of the hours actually logged by petitioners during the two year statutory period prior to the filing of the complaint: Plaintiff's Exhibit 4. Conversely, it is not disputed that the re-

spondent employer kept no record whatever of unpaid waiting time.

In dealing with the pivotal question raised by this petition, the facts will be stated within the framework of respondent's own evidence.[2] The employer's instructions to the petitioning truck drivers which gave rise to unpaid waiting time were testified to by the employer's own foremen. Even after the Wages and Hours investigation was completed (thus plainly calling to respondent's attention the impropriety of his conduct with respect to waiting time) it was the testimony of Milton F. Grimes, his foreman, that respondent instructed his employees as follows:

> "Q. Was there a meeting that took place at about the time Mr. Sturgis completed his investigation out there in which you attended and Mr. Clark attended and the men attended?
>
> A. I believe so.

---

[2]However, this Court may feel moved to take into account the testimony of Arminta McClaim, particularly at R.T. p. 4, line 24 through p. 8, line 7, in view of the fact that the trial Court relied on some of her evidence, and apparently thus found her credible, in denying our motion for new trial. (R. 124.)

Moreover, it is with great reluctance that we relinquish the right to rely on the testimony of Teamster official Joe Foster, who testified regarding respondent's statement to him as follows:

> "A. Do you want the exact words or the crux of his statement?
>
> Q. Go ahead.
>
> A. He said, 'We have to service our customers on short notice because if we don't do it this way we won't get the business, because if we have to wait for them fellows to come from their home to get out here and pick the truck up, we won't get the job; somebody else would be doing it—and they're going to be down here available for work.' That's exactly what he said." (R.T. p. 174, lines 5-14.)

It is to be noted that we did not adduce this testimony on direct examination, but rather it was adduced by respondent's counsel himself on cross-examination.

Q. And Mr. Clark, one might say, officiated at that meeting?

A. As I recall, he was there; yes.

Q. What did he tell them then?

A. In what way, sir?

Q. What did he tell the men particularly with respect to showing up at 7:00 o'clock and when they could leave and so forth.

A. Well, he told them they didn't have to show up.

Q. Ever?

A. I believe his words were, 'You don't have to show up unless you want to.'

Q. 'But if you don't show up,' what?

A. *If you don't show up, the boys that were there would get the job.*" (R. 32, line 24 to R. 33, line 7.)

The foreman who preceded Grimes and whose tenure filled out the two year statutory period with which the case is concerned was named Ben D. Kretzinger. He testified as follows:

"Q. Did you have any conversation about when the work came in or anything of that nature?

A. Oh, yes; they'd ask me—nearly all of them would ask me what time they should show up around there and I'd say, 'Well, usually show up around 7:00 o'clock, the rest of the boys do and to make a good job out of it, it would be well to show up at 7:00 o'clock, it's up to you.' *About show-up time, 'If you want to make a living, the early bird gets the worm.'*" (R. 32.)

Even respondent himself, although he hedged a bit, essentially confirmed what his own foremen had tes-

tified to. At R.T. 137, lines 2-13, he testified as follows:

> "Q. Do you know why they were there?
> A. Waiting to be hired is all that I could say that they would be waiting for.
> Q. Would they be more apt to get the job if they were there than if they had to be called at home?
> A. If it were a rush job or—yes.
> Q. In other words, is it a fair statement to say that you are testifying that the men who did show up at 7:00 o'clock prior to this date of the departure of the dispatcher for back east were doing it on their own initiative because they thought they might have a chance to get a rush job?
> A. Yes." (R.T. 136, line 11 to R.T. 137, line 14; italics in foregoing quotations are ours.)

Thus, even according to respondent and his own foremen, the presence of petitioners on the premises during the uncompensated waiting periods was done under the economic coercion of earning lesser money if they took their chances by staying home.

The trial Court rendered judgment in favor of petitioners for the short period of time between June 25, 1965, and July 5, 1965, on the basis that the petitioners were actually required to remain on the premises by explicit orders during that period. (R. 100, lines 19-22.) The amounts were nominal, although it was interesting to note that the Court awarded the penalty which may be imposed on a discretionary basis for this short period by giving the

full measure of double damages in each case. (29 U.S.C.A. 216-b, 29 U.S.C.A. 260, and R. 103-104.)

REASONS FOR GRANTING THE WRIT

We think respondent's own evidence makes it perfectly clear that the time spent by petitioners on respondent's premises waiting for jobs to come in was "voluntary" solely in the sense that the men were free to stay home and deprive themselves and their families if they wished to. And we think it equally clear that the trial Court's finding that the men were "free to come and go as they pleased" is only true in the sense that the men were free to leave the premises any time they were willing to lessen the likelihood that they would have any work that day. (Cf. testimony of the foreman Grimes, the foreman Kretzinger and respondent himself, already quoted and cited.) The question is therefore starkly presented: may an employer, for his own profit, use the economic coercion of less work, or no work, on a given day to pressure the employees to remain on his premises, *even assuming arguendo that their presence was in that context "voluntary" and that in the same context the men were "free to come and go as they pleased"?*

Walling v. Dunbar Transfer and Storage, Inc., 7 Labor Cases 64,599 at 64,600 (we can find no Fed. Supp. citation), is a good point of departure. In closely similar circumstances the Court wrote:

> "It was for the benefit and to the advantage of defendant and necessary for the successful oper-

> ation of its business that its employees remain immediately available for assignment to specified tasks."

We think a full reading will show that the parallels to the instant case in *Dunbar Transfer* are remarkably close. Other cases in the field of waiting time are *Armour & Co. v. Wantock,* 323 U.S. 126, 89 L.Ed. 118, 65 S.Ct. 165, and *Skidmore v. Swift & Co.,* 323 U.S. 134, 89 L.Ed. 124, 65 S.Ct. 161, and particularly the annotations immediately following in the Law Edition volume. A case precisely in contrast to the present one, where priority of work assignments was entirely eliminated, is *Goldberg v. Gable,* 45 Labor Cases 41,352 (we can find no Fed. Supp. citation).

It is immaterial that petitioners reluctantly agreed to respondent's conduct with respect to waiting time. *Travis v. Ray,* 41 F. Supp. 6 at page 8.

The Court of Appeals for the Ninth Circuit itself has earlier insisted on "economic reality" in applying the provisions of the Act. *Westover v. Stockholders Publishing Co.,* 237 F. 2d 948. And it has been said by this Court that the Fair Labor Standards Act should be interpreted in the light of the "underlying economic realities". *Rutherford Food Corp. v. McComb,* 331 U.S. 722 at 727, 91 L.Ed. 1772, 67 S.Ct. 1473; and see *Bumpus v. Continental Baking,* 124 F. 2d 549 at 551.

We respectfully urge that economic reality will have been entirely ignored if this judgment stands. For example: a manufacturer of specialty items,

whose factory can be run most economically only when he receives a specific order justifying a production run, could make nonsense out of the Fair Labor Standards Act. He could have on his payroll three times as many employees as he actually needed and then instruct them as follows: "When we do not have a production run going, your presence here is purely voluntary; indeed, you are free to come and go as you please. However, those who are at their machines on the line at the time that a production order arrives at the factory will, for the most part, be the people who will be employed and paid for the work done during the production run."

Surely it is self-evident that workers would be on the production line hour after hour, waiting to be there when the work came in. The manufacturer could have instant production and economical production, but he would have it at the cost of insufferable hardship. Even more pertinently, he would have rendered a mockery of the Fair Labor Standards Act.

Finally, we urge that the Court of Appeals' reliance on *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37, is inappropriate. Certainly, there are kinds of employment (as firemen in the *Skidmore* case) where remaining near the premises is an obvious and inevitable ingredient of the employment itself. Respondent does not so contend in the instant case. Rather, as seen earlier, he and his foremen insisted that the men were free to come and go as they pleased; it is the *priority of employment* given to those who remained on the premises that constitutes economic coercion in the

present case. *It should particularly be noted that when the respondeent for a brief period made presence explicitly mandatory, as in Skidmore, judgment with double damages was awarded to petitioners by the trial Court.*

Equally we say that the reliance by the Court of Appeals on 29 CFR Chapter V 785.17 is not appropriate, because it does not encompass the circumstances where presence on the premises is coerced by giving priority to those on the premises. It is not necessary to make any attack on the cited regulation, since the present si. .ation is clearly distinguishable from any envisaged by the regulation.

Even more importantly, the decision of the Court of Appeals wholly fails to come to grips with the economic benefit to the employer that resulted from the system of priority which was used here. Economic coercion was used by the employer, as unequivocally shown by the testimony of his foreman and even himself; self-evidently this economic coercion was used to the economic *advantage* of the employer in placing himself in a better competitive position. On this subject the Court of Appeals is totally silent. We have earlier conceded that the trial Court could have disbelieved the testimony of Teamster official Joe Foster, but a reading of the record "in the light of economic reality" requires the conclusion that Foster spoke nothing more than the self-evident truth when quoting respondent as saying:

> "We have to service our customers on short notice because if we don't do it this way, we

> won't get the business, because if we have to wait for them fellows to come from their homes to get out here and pick the truck up, we won't get the job. Somebody else would be doing it—and they are going to be down here available for work." (R.T. p. 174.)

It is difficult indeed to imagine any other reason for respondent's having issued the show-up orders testified to by his foremen and himself. The decision of the Court of Appeals tears a gaping hole in the fabric of the Fair Labor Standards Act; there are too many ways by which the intent of the Act can be avoided if it is permitted to stand.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated, Bakersfield, California,
November 25, 1968.

Respectfully submitted,
THOMAS R. DAVIS,
Attorney for Petitioners.

DI GIORGIO, DAVIS, NAIRN, HASTIN & KLEIN,
Of Counsel.

(Appendix Follows)

Appendix

In the United States District Court
Eastern District of California

No. 2703 ND

Sidney L. Irwin, Ray Lester Long, Sherrill Long, Alan Duane Luther, Melvin Long, Wayne King and Harry Edward Allen,
Plaintiffs,

vs.

Bob Clark, doing business as Oilfield Vacuum Service,
Defendant.

MEMORANDUM AND ORDER

This is an action to recover unpaid wages and overtime, liquidated damages and attorney's fees pursuant to the Fair Labor Standards Act (29 U.S.C. 201-219), and was tried and submitted for decision on written argument. The plaintiffs were represented by Thomas R. Davis; and defendant was represented by William A. Quinlan.

Defendant concedes that plaintiffs were directly essential to the production of oil which moved in interstate commerce, so come within the purview of the Fair Labor Standards Act.

Jurisdiction is conferred upon this court by 28 U.S.C. 1337.

Plaintiffs concede that they have been paid for all hours they actually worked, but here seek to add the time they were waiting to go to work.

Plaintiffs were on call 24 hours per day, 7 days per week, and many of them frequently came to defendant's place of business between 7:00 a.m. and 8:00 a.m. without being called because most of the work came in early in the morning and the men available received the most work, although an effort was made to equalize the hours amongst all the employees.

Plaintiffs were not required to report for work at any given time and were free to go and come as they pleased as long as they left a telephone number where they could be called in the event they were needed.

Thus, they are not entitled to additional compensation except for the period from June 25, 1965 to July 5, 1965, when they were required to remain on defendant's premises.

Their rate of pay should be figured as truck drivers, as that is what they were waiting to be, and not at the minimum wage as figured by the defendant.

A review of the records of work indicates the following plaintiffs were employed during this period:

Wayne King

6/24 & 6/25/65	waiting time 10¼ hrs @ $3.26	$ 33.42
6/27 to 7/ 3/65	waiting time 18 hours @ $3.26	58.68
	adjustment for 8¼ hours overtime @ $1.63	13.45
7/ 4 & 7/ 5/65	waiting time 6½ hours @ $3.26	21.19
		$126.74

Ray Long

6/24 & 6/25/65	waiting time 1½ hours @ $3.26	$ 4.89
6/27 to 7/ 3/65	waiting time 8¾ hours @ $3.26	28.53
	adjustment for overtime 17 hours @ $1.63	27.71
7/ 4 & 7/ 5/65	waiting time 6 hours @ $3.26	19.56
		$ 80.69

Sherrill Long

6/29/65	waiting time 1 hour @ $3.26	$ 3.26

Al Luther

6/24 & 6/25/65	waiting time ¾ hour @ $3.26	$ 2.45
6/27 to 7/ 3/65	waiting time 2 hours @ $3.26	6.52
		$ 8.97

Sidney Irwin

6/24 & 6/25/65	waiting time 8 hours @ $3.26	$ 26.08
6/27 to 7/ 3/65	waiting time 16¾ hours @ $3.26	54.60
	adjustment for overtime 17¼ hours @ $1.63	28.12
7/ 4 & 7/ 5/65	waiting time 4½ hours @ $3.26	14.67
		$123.47

Plaintiff is granted judgment as follows:

Total damages	$343.13
Penalty	343.13
Attorney's fees	1,000.00
	$1,686.26

plus costs of suit.

Counsel for plaintiffs is directed to prepare and lodge findings of fact, conclusions of law and form of judgment in accordance with Local Rule 21.

The clerk of this court is directed to serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated: January 30, 1967.

M. D. Crocker
Chief United States District Judge

United States Court of Appeals
for the Ninth Circuit

Sidney L. Irwin, Ray Lester Long, Sherrill Long, Alan Duane Luther, Melvin Long, Wayne King and Harry Edward Allen, Appellants, vs. Bob Clark, d/b/a Oilfield Vacuum Service, Appellee.	No. 22,042

[September 11, 1968]

Appeal from the United States District Court
for the Eastern District of California.

Before: ELY and CARTER, Circuit Judges, and SMITH,* District Judge.

SMITH, District Judge.

We have for review a judgment of the district court denying in large part plaintiffs' claims for compensation under the Fair Labor Standards Act. The dispute involves the question of whether waiting time for which the plaintiffs were not paid, is working time which must be compensated.

The findings of the district court are not attacked on this appeal as being without support in the evidence. From them it appears: Defendant was engaged in the oil field servicing business. Plaintiffs were em-

*Hon. Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

ployed as truck drivers. Defendant's business was somewhat sporadic and the truck drivers were paid only when their services were utilized. They were on call twenty-four hours per day and seven days per week, but were not, as a condition of their employment, required to report at any given time, or remain for any stated period on the employer's premises. They were required to leave a telephone number where they could be called in the event that they were needed. Many of the plaintiffs frequently came to defendant's place of business between seven and eight o'clock A.M. voluntarily and without being called. Often if there was no work to be done at the time of reporting, they would wait for some period on the employer's premises on the chance that a work order would come in and that their services would be needed. While thus waiting, the plaintiffs performed no services for the employer, but the men who were on the premises and immediately available were the ones who received the most work. On this appeal plaintiffs do not contend that they would have been fired had they not reported and waited as they did. The trial court concluded as a matter of fact and law that the plaintiffs were not "hired to wait" but were "waiting to be hired".

Plaintiffs do not complain of a lack of evidence to support these findings, but rather contend that the men reported and waited as they did because of the likelihood of a better pay check. Plaintiffs conclude from this that the waiting was not voluntary as a matter of law. In short, it is plaintiffs' position that if there is any economic reward for waiting, that

the waiting must be compensated. With this we do not agree.

Waiting time may be working time,[1] but whether so is a question of fact to be resolved by appropriate findings of the district court in light of all the circumstances.[2] From the *Skidmore* case it is clear that economic compulsion is not a controlling factor. In that case the firemen were required, as a condition of their employment agreement, to stay in or close to the fire hall. Presumably they would not be hired were they unwilling to do so. Even where the employment itself, and not just the amount of the emolument, depended upon waiting, the Supreme Court did not direct a judgment for the complaining firemen, but remanded the case for further proceedings. Implicit in the opinion of the Supreme Court is the idea that the district court might as a matter of fact find that

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[1]Armour & Co. v. Wantock, 323 U. S. 126 (1944).

[2]"For reasons set forth in the Armour case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. Walling v. Jacksonville Paper Co., 317 U. S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." Skidmore v. Swift & Co., 323 U. S. 134, 136-37.

the waiting time (compelled as it was) was not working time, so long as the district court disabused itself of the erroneous notion that waiting time could not be working time.

The element of economic compulsion may very well be one which a district court would find to be an important circumstance in the solution of some waiting time—working time problems but it is not as a matter of law a controlling factor.

When we view the findings of the district court as findings of fact, we cannot say that the court was in error in not allowing the matter of economic compulsion to control them. This is particularly so on this record which does not show how much work plaintiffs might have lost had they not waited. For all that the record shows, the economic compulsion may have been minimal. The result reached by the district court was in accord with the interpretive bulletins issued by the Wage and Hour Administrator.[3] Such interpretations are entitled to respect.[4]

The judgment is affirmed.

---

[3]"An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call'. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call."

"Idle time, waiting to resume work during the work day, may be excluded from working time. Waiting time would be considered off duty time and not part of the employee's hours of work if he is completely relieved of all duty and responsibilities and is permitted to leave the job and go where he pleases." 29 C.F.R. Ch. V, § 785.17.

[4]Skidmore v. Swift & Co., fn. 2, supra; Dumas v. King, 157 F.2d 463 (8 Cir. 1946); Gordon v. Paducah Ice Mfg. Co., 41 F. Supp. 980 (W.D. Ky. 1941); Thompson v. Daugherty, 40 F. Supp. 279 (D. Md. 1941).